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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RONDELL JOHNSON,
Petitioner,
v.
Warden JAQUEZ,
Respondent.

No. C 10-416 SI (pr)

ORDER ON INITIAL REVIEW

INTRODUCTION

Rondell Johnson, an inmate at Pelican Bay State Prison, filed this pro se action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. His petition is now before the court for review pursuant to 28 U.S.C. §2243 and Rule 4 of the Rules Governing Section 2254 Cases.

BACKGROUND

Johnson states in his petition that he was convicted in the Alameda County Superior Court of murder, assault with a deadly weapon and robbery. He was sentenced in March 2006 to 75 years to life in prison. He appealed. His conviction was affirmed by the California Court of Appeal and his petition for review was denied in 2008. He apparently filed one or more state habeas petitions.

Johnson then filed this action, seeking a writ of habeas corpus. His petition has a signature date of January 13, 2010, and came to the court in an envelope with a January 25, 2010 postmark. The petition was stamped "filed" on January 28, 2010.

DISCUSSION

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall "award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243. Under Rule 4 of the Rules Governing Section 2254 Cases In The United States District Courts, a district court may also order the respondent to file another pleading where neither summary dismissal nor service is appropriate.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which became law on April 24, 1996, imposed for the first time a statute of limitations on petitions for a writ of habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-capital state convictions or sentences must be filed within one year of the latest of the date on which: (1) the judgment became final after the conclusion of direct review or the time passed for seeking direct review; (2) an impediment to filing an application created by unconstitutional state action was removed, if such action prevented petitioner from filing; (3) the constitutional right asserted was recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactive to cases on collateral review; or (4) the factual predicate of the claim could have been discovered through the exercise of due diligence. See 28 U.S.C. § 2244(d)(1). Time during which a properly filed application for state post-conviction or other collateral review is pending is excluded from the one-year time limit. See id. § 2244(d)(2).

The petition in this action was filed more than a year after petitioner's conviction became final, and may be untimely under the AEDPA's one-year limitation period. This apparent procedural problem should be addressed before the court reaches the merits of the claims raised in the petition. If the petition is time-barred, the litigants and court need not expend resources addressing the claims in the petition. Accordingly, pursuant to Rule 4 of the Rules Governing

1 Section 2254 Cases In The United States District Courts, respondent must either (1) move to
2 dismiss the petition on the ground that it is untimely, or (2) inform the court that respondent is
3 of the opinion that a motion to dismiss is unwarranted in this case.

4 Johnson has moved for appointment of counsel. A district court may appoint counsel to
5 represent a habeas petitioner whenever "the court determines that the interests of justice so
6 require and such person is financially unable to obtain representation." 18 U.S.C. §
7 3006A(a)(2)(B). The decision to appoint counsel is within the discretion of the district court.
8 See Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986). Appointment is mandatory only
9 when the circumstances of a particular case indicate that appointed counsel is necessary to
10 prevent due process violations. See id. The interests of justice do not require appointment of
11 counsel in this action. The motion for appointment of counsel is denied.

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13 CONCLUSION

14 Good cause appearing therefor,

15 1. The clerk shall serve by certified mail a copy of this order and the petition upon
16 respondent and respondent's attorney, the Attorney General of the State of California. The clerk
17 shall also serve a copy of this order on petitioner.

18 2. Respondent must file with the court and serve upon petitioner, on or before
19 **December 10, 2010**, a motion to dismiss the petition or a notice that respondent is of the opinion
20 that a motion to dismiss is unwarranted.

21 3. If petitioner wishes to oppose the motion to dismiss, he must do so by filing an
22 opposition with the court and serving it upon respondent on or before **January 14, 2011**.

23 4. Respondent may file and serve a reply on or before **January 28, 2011**.

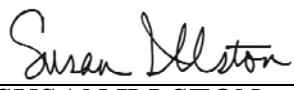
24 5. The motion will be deemed submitted as of the date the reply brief is due. No
25 hearing will be held on the motion. If respondent notifies the court that a motion to dismiss is
26 unwarranted or the motion to dismiss is decided against respondent, the court will then
27 determine whether to require an answer to the petition.

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1 6. Petitioner's motion for appointment of counsel is DENIED. (Docket # 11.)
2 7. Petitioner's in forma pauperis application is DENIED. (Docket # 2, # 10.) He has
3 sufficient funds in his inmate account to pay the \$5.00 filing fee. No later than **November 5,**
4 **2010**, petitioner must pay the \$5.00 filing fee. Failure to pay the fee by the deadline may result
5 in the dismissal of this action.

6 IT IS SO ORDERED.

7 DATED: October 4, 2010



SUSAN ILLSTON
United States District Judge

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